

No. 10969

United States
Circuit Court of Appeals
For the Ninth Circuit.

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Respondent.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

FEB 21 1944

PAUL P. O'BRIEN,
CLERK

No. 10969

United States
Circuit Court of Appeals

For the Ninth Circuit.

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Respondent.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Appeal:	
Clerk's Certificate to Transcript of Record on	48
Notice of.....	47
Statement of Points on.....	49
Certificate of Clerk to Transcript of Record on Appeal	48
Exhibit 'A'—Memorandum of Opinion by Michael Judge Roche, in Case No. 23016 R, Ralph Swihart, Petitioner, vs. James A. Johnston, etc., Respondent	41
Memorandum of Opinion.....	41
Memorandum of Petitioner—In Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus.....	19
Motion for Reargument upon the Petition for Writ of Habeas Corpus in Case No. 23604-G	32
Motion to Dismiss Petition for Writ of Habeas Corpus	17
Memorandum of Points and Authorities..	18
Names and Addresses of Attorneys.....	1

Notice of Appeal.....	47
Order Denying Motion for Reargument and Rehearing, dated October 25, 1944.....	46
Order Denying Petition for Writ of Habeas Corpus and Dismissing Petition	30
Order to Show Cause	16
Petition for Writ of Habeas Corpus	2
Exhibit "A"—Indictment in the United States District Court, Eastern District of Oklahoma, Case No. 22273, United States vs. Ralph Swihart	6
Exhibit "B"—Docket Entries and Minutes of March 13, 1940, in Case No. 22273, United States vs. Ralph Swihart, in the United States District Court	10
Exhibit "C"—Letter, dated July 31, 1944, to Ralph Swihart from United States At- torney, Eastern District of Oklahoma...	14
Exhibit "D"—Letter, dated July 14, 1944, to Ralph Swihart, from Clerk of United States Court, Eastern District of Okla- homa	15
Statement of Points on Appeal	49

NAMES AND ADDRESSES OF ATTORNEYS

RALPH SWIHART, Esq.,

No. 590,
Alcatraz, California.

In Propria Persona.

FRANK J. HENNESSY, Esq.,

United States Attorney,
Northern District of California.

JOSEPH KARESH, Esq.,

Assistant United States Attorney,
Northern District of California.

Post Office Building,
San Francisco, California.

Attorneys for Respondent and Appellee.

In the United States District Court for the Northern District of California, Southern Division

H. C. No. 23604 G

In the Matter of

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden United States Penitentiary, Alcatraz Island,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Ralph Swihart respectively shows:

That he is illegally restrained of his lawful liberty, by color of authority of the United States; and in the immediate custody of James A. Johnston, Warden of the United States Penitentiary, Alcatraz California; which aforesaid penitentiary is within the jurisdiction of this Honorable Court.

STATEMENT OF FACT

On February 15th, an indictment number 22273, containing two counts, was returned against petitioner, in the United States District court for the Eastern District of Oklahoma. Said indictment alleged a violation of Section 409 of Title 18 U.S.C.A. In support thereof, made a part hereof, is a certified copy of said Indictment. Exhibit A.

On March 13th, 1940; on a Plea of Not Guilty, petitioner, Without The Constitutional Right, of Trial By Jury, was [1*] Found Guilty, and immediately sentenced to imprisonment, and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner is now restrained of his lawful liberty, by color of authority of a court judgment, Without Force or Effect In Law, in that his conviction was obtained without due process of law, expressly in violation of the Fifth Amendment to the United States Constitution. In as much that He Pleaded Not Guilty—yet Had No Jury Trial, constitutionally guaranteed by Article III, Section Two, Par. Three, of the original United States Constitution, and reiterated in the Sixth amendment and emphasized in the Seventh amendment to the United States Constitution.

STATEMENT OF THE CASE

On March 13, 1940, counsel for petitioner William P. Gullatt, after repeated attempts to induce petitioner to sign a waiver to trial by jury had failed, he, counsel for petitioner conferred and agreed with the court, to waive petitioner's right to trial by jury. Such an agreement was made betwixt the court and prosecuting officials, by counsel for petitioner, to waive his constitutional right to trial by jury, and positively was not done in the presence of petitioner.

*Page numbering appearing at top of page of original certified Transcript of Record

When petitioner was returned to court after the noon recess, counsel informed petitioner of this arrangement, as to trial by judge. Petitioner vigorously protested before the [2] court of proceeding to trial without a jury, in words of a common layman. The Honorable Alfred P. Murrah, aforesaid District Judge, told petitioner that he did not have any malice against him; still petitioner protested and was sternly told by aforesaid judge, that he had counsel to defend him, and to set down.

Petitioner was not advised by the court of the arrangements made by counsel concerning the waiver of trial by jury, or was he advised of his constitutional right thereto, nor of the consequences contingent upon the dispensation of that right.

The trial before the Judge promptly began, while petitioner was completely confused by this unexpected and objectable turn of events. Thus bewildered he stood, amidst an unfriendly court, abashed and fearful of this perplexing situation; detrimental to his best interest, contrary to what was his will, and which was inconsistent with due process of law, and the express command of the United States Constitution; which, in and of itself, could not be construed by the wildest stretch of the imagination, as a competent, intelligent and voluntary waiver of a constitutional right.

In the leading cases upon this subject, the United States supreme court has held such a constitutional right cannot be waived, unless it be in writing, and signed by the defendant in the case; and such fact duly recorded in the records. That would, in the

opinion of ruling case laws, constitute an intelligent and competent waiver. Exhibit B and C. [3]

The natural sequence of such unorthodox procedure hastily followed, and the then presiding District Judge, Honorable Alfred P. Murrah, thereupon, within a matter of minutes, declared petitioner guilty, and imposed the maximum penalty; a total.....sentence of twenty years in a federal penitentiary.

PRAYER OF PETITIONER

Wherefore, petitioner prays this Honorable court for a Court order to the Respondent herein, Warden James A. Johnston, commanding him to release petitioner forthwith from further illegal custody; so petitioner will ever pray.

RALPH SWIHART

Petitioner, Pro. Se.

AFFIDAVIT OF VERIFICATION

Personally appeared before me Ralph Swihart, who after being first duly sworn, upon his oath deposes and says:

That he has read the contents thereof; and that they are true to the best of his knowledge & belief.

RALPH SWIHART

Affiant and Petitioner. [4]

Subscribed and sworn to before me, a notary public this 21 day of August, 1944.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Ralph Swihart Is A Citizen of The United States.

E. J. MILLER

Associate Warden,
United States Penitentiary,
Alcatraz, California.

[Seal]

.....

Warden—Associate Warden
Authorized by the Act of
February 11, 1938, to administer oaths. [5]

EXHIBIT "A"

22273

United States of America,
Eastern District of Oklahoma—ss.

In the United States District Court in and for the Eastern District of Oklahoma, at the regular January 1940 Term thereof, of Muskogee, in February.

The Grand Jurors of the United States of America, duly empaneled, sworn and charged in the District Court of the United States within and for the Eastern District of Oklahoma to inquire into and due presentment make of all offenses against the laws of the United States committed and triable in said District, do, upon their oaths, find, present and charge that on or about the 7th day of December, 1939, One

RALPH SWIHART,

whose more full, true and correct name is at this

time to the Grand Jurors unknown, then and there being, at Ada, in Pontotoc County, in the Eastern District of Oklahoma, and within the jurisdiction of this Court, did, wilfully, wrongfully, unlawfully and feloniously break seals No. 826, 350 and No. 833, 359 on the west side and the east side respectively of Milwaukee freight car No. 708,936 containing interstate shipments of freight, moving from Louisville, Kentucky, to Ada, Oklahoma, [6] under L. & N. waybill No. 80,181, and which was then and there in transit and had been conveyed as a part of an interstate shipment contained in the aforementioned railroad car, and which said railroad car and interstate shipment of freight therein was then and there in the possession, custody and control of the Oklahoma City-Ada-Atoka Railway Company, a corporation common carrier, when the seal on same was so wilfully, unlawfully, wrongfully and feloniously broken in Pontotoc County, in the Eastern District of Oklahoma, by the said defendant, without the knowledge or consent of the said Oklahoma City-Ada-Atoka Railway Company, or any person authorized to give such consent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

/s/ CLEON A. SUMMERS

United States Attorney.

A true bill:

/s/ D. P. KENNEDY

Foreman. [7]

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge that, on or about the 7th day of December, 1939, the said

RALPH SWIHART

whose more full, true and correct name is at this time to the Grand Jurors unknown, hereinafter referred to as defendant, at Ada, in Pontotoc County, in the Eastern District of Oklahoma and within the jurisdiction of this Court, then and there being, did, wilfully, wrongfully, unlawfully and feloniously enter Milwaukee freight car No. 708,936 containing interstate shipments of freight, moving from Louisville, Kentucky, to Ada Oklahoma, under L. & N. waybill No. 80,181, with intent to commit larceny therein, which said car contained merchandise shipped in interstate commerce from Louisville, Kentucky, to Ada, Oklahoma, and which had been in transit and had been conveyed as a part of an interstate shipment contained in the aforementioned railway car, and which said railway car and interstate shipment of personal property therein was then and there in the possession, custody and control of the Oklahoma City-Ada-Atoka Railway Company, a corporation common carrier, when so wilfully, wrongfully, unlawfully and feloniously entered, in Pontotoc County, in the Eastern District of Okla- [8] homa, by the said defendant, with intent to commit larceny therein, without the knowledge or consent of the said Oklahoma City-Ada-Atoka Railway Company, or any one authorized to

give such consent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

/s/ CLEON A. SUMMERS

United States Attorney.

A True Bill:

/s/ D. P. KENNEDY

Foreman. [9]

United States of America,
Northern District of California

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be full, true, and correct copies of the Indictment, Judgment and Commitment and Docket Entries re U.S. v. Swihart, No. 22273, Eastern District of Oklahoma, filed as Exhibits to the Petition for Writ of Habeas Corpus, in the matter of Ralph Swihart vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, No. 23016-R. as the same now remains on file and of record in this office.

Attest my hand and the seal of the said United States District Court, Northern District of California, at San Francisco, California, this 19th day of May, A.D. 1944.

Fee of \$2.15 paid.

[Seal]

C. W. CALBREATH

Clerk.

By C. M. TAYLOR,

Deputy Clerk. [10]

EXHIBIT "B"

340

Criminal—Docket 22273

THE UNITED STATES,

vs.

SWIHART, RALPH.

Attorneys:

.....

For U. S.

.....

For Defendant

Pontotoc

Larceny Interstate Shipment
Cash Received and Disbursed

Abstract of Costs	Amount	Date	Name	Received	Disbursed
		Month Day Year			

Fine,
Clerk,
Marshal,
Attorney,
Commissioner's Court,
Witnesses,
Proceedings

No. of Words Clerk's Fees
Plaintiff Defendant

Date

1940

Feb. 15—Filing Indictment. 5 00.

Feb 17—Order Mr. Shearer Brown Appt as Coun-
sel to advise Defendant, & Deft. duly
arrgd. & P.N.G. 5 00.

1940

Mar. 1—Filing praecipe & issuing subpoenas, 10 witnesses.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: C. A. Conway served 3/4/40.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: Floyd O. Clark served 3/4/40.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: M. B. Fash & R. H. Colvin served 3/4/40.

Mar. 6—Filing Praecipe, Issuing Subpoenas 5 witnesses.

Mar. 12—Filing Praecipe, Issuing Subpoenas 2 Govt witnesses. [11]

Mar 13—Order said cause proceed to trial before the court the deft having waived in open court his constitutional right to trial by a jury and being represented by counsel Mr. William P. Gullatt.

Mar. 13—Entering verdict of guilty.

Mar. 13—Entering judgment & sentence-Deft sentenced to U.S. Pen Leavenworth for 10 years on count one (1) and 10 years on count 2 to be cumulative and begin at expiration of sentence on count (1). 5 00.

Mar. 13—Issuing commitment.

Mar. 27—Filing and Entering Marshal's Return on subpoenas L. L. Farram, served 3/9/40. A. R. Haggitt, Chas. Cosgrove, Glennie Cosgrove served 3/8/40, Lem H. Tillie served 3-11-40, Bee Pounce, G. W. Vandiveer, Lester Denny & Sam Wright & Lloyd Adams served 3-6-40.

1940

Apr. 1—Filing and Entering Marshal's Return on
Commitment: Deft to U.S. Pen. 3/25/40.

[12]

D. C.

On this 13 day of March 1940, the District Court of the United States for the Eastern District of Oklahoma, sitting in regular session at Ada, Oklahoma met pursuant to recess; Hon. Alfred P. Murrah, Judge, present and presiding the following proceedings were had to wit:

22273 Ralph Swihart (PNG) Larceny Iss.

Order said cause proceed to trial as to deft Ralph Swihart being represented by counsel Mr. William P. Gullatt and who in open court waives his constitutional right to trial by jury and agrees to try said cause to the Court, witnesses sworn and testimony introduced.

Plaintiff Rests.

1:30 to 3:17 Defendant demurs to evidence of the Plaintiff and is overruled by the Court.

Defendant Rests.

Enter Order of Court finding Defendant guilty on both counts of the indictment.

Enter Order Judgment Defendant Ralph Swihart sentenced to custody of Attorney General for 10 yrs. on count 1. & 10 yrs, on count 2 to begin at the expiration of the sentence on count 1.

Court Recessed Subject To Call. [13]

United States of America,
Eastern District of Oklahoma—ss.

I, John H. Pugh, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries and Minutes of March 13, 1940.

In re: United States of America, Plaintiff,
vs. Ralph Swihart, Defendant, Case No. 22273-Criminal.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Muskogee, Oklahoma this 13th day of November, A.D. 1944.

[Seal]

JOHN H. PUGH

Clerk.

By J. J. CONRAD

Deputy Clerk. [14]

EXHIBIT "C"

Department of Justice
United States Attorney
Eastern District of Oklahoma
Muskogee, Oklahoma
July 31, 1944

Ralph Swihart,
Box No. P.M.B. 590
Alcatraz, California.

Dear Sir:

I have your letter relative to whether or not a waiver of a jury in your case was oral or in writing.

The records in this case is silent on this question, however, it has not been the custom in this District up to this time to have a waiver of jury made in writing, either by the Government or by the defendant. The records show that Mr. Sherar Brown was your attorney in this case and that the waiver of jury was made in open court.

Yours very truly,
(Signed) CLEON A. SUMMERS,
United States Attorney.

CAS:r.

The above is a true and accurate copy of the original as witnessed by me this 21 day of August, 1944.

E. J. MILLER

E. J. Miller,

Associate Warden,

United States Penitentiary,
Alcatraz, California. [15]

EXHIBIT "D"

United States District Court
Office of the Clerk
Eastern District of Oklahoma
Muskogee, Okla.,
July 14, 1944.

Mr. Ralph Swihart,
Box P.M.B. 590,
Alcatraz, California.

Re: Case No. 22273-Cr.

Dear Sir:

Receipt is acknowledged of your letter of June 30th with further regard to the above numbered case and in reply thereto, you are hereby advised that:

(1)—The files of this office do not show who the consignee was of shipment of goods billed under L & N waybill No. 80,181;

(2) Our files do not show who the consignor was nor his location and;

(3) Our files do not reflect of what the merchandise consisted so shipped under waybill No. 80,181.

It is sincerely hoped that the above statement will fulfill your request and that no further correspondence will be necessary in regards to the same.

There is no charge for making this statement,

therefore your check for \$1.50 is herewith returned to you with restricted endorsement thereon. [16]

Yours very truly,

(Signed) JOHN H. PUGH,

Clerk.

U. S. District Court.

By RANDOLPH KIZZIRE,

Chief Deputy.

RK:BL

Enclosure.

The above is a true and accurate copy of the original as witnessed by me the 21 day of August, 1944.

E. J. MILLER

E. J. Miller,

Associate Warden,

United States Penitentiary,
Alcatraz, California.

[Endorsed]: Filed in open court Feb. 15, 1940,
W. V. McClure, Clerk, U. S. District Court.

[Endorsed]: Filed Aug. 23, 1944. C. W. Calbreath, Clerk.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alca-

traz Island, State of California, appear before this Court on the second day of September, 1944, at the hour of 10 o'clock A.M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: August 24, 1944.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Aug. 25, 1944. [18]

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves to dismiss the petition for writ of habeas corpus on the ground that the reading of this petition in conjunction with the record in the prior petition in case No. 23016-R indicates that there is no merit therein, and that the same is insufficient to justify the issuance of a writ of habeas corpus. [19]

Dated September 16, 1944.

FRANK J. HENNESSY

United States Attorney

JOSEPH KARESH,

Assistant United States At-
torney,

Attorneys for Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES

This is the second petition filed herein by the petitioner for a writ of habeas corpus in which he raises a jurisdictional question identical to that previously raised in a prior petition in Case No. 23016-R, to-wit: loss of jurisdiction of the trial court to proceed because the petitioner was forced to trial without jury and without proper waiver thereof, and while the alleged facts in support of his present petition are in conflict with those previously alleged, thereby indicating that the petitioner deliberately made a false and perjured pleading on one, if not both occasions, petitioner was accorded ample opportunity in the first hearing on a writ actually issued to present and prove facts showing that he had not waived a jury at the time of his trial and conviction, and there is nothing presented in or in support of his present petition to indicate that any useful purpose would be served by the issuance of a writ. [20]

Accordingly, it is respectfully submitted that the same should be denied. Otherwise habeas corpus

proceedings instituted by prisoners at Alcatraz will become a mockery.

See *Salinger v. Loisel*, 265 U. S. 224. *Mothershead v. King*, 37 Fed. Sup. 210, 213. U.S. ex rel *Bergdoll v Drum*, 107 Fed. (2d) 897, 899.

FRANK J. HENNESSY

United States Attorney.

JOSEPH KARESH

Assistant U. S. Attorney

[Endorsed]: Filed, Sept. 16, 1944. [21]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 23604-G

RALPH SWIHART,

Petitioner & Movant

vs.

JAMES A. JOHNSTON, Warden, UNITED
STATES PENITENTIARY, ALCATRAZ,
CALIFORNIA,

Respondent.

MEMORANDUM OF PETITIONER.

IN OPPOSITION TO RESPONDENT'S MO-
TION TO DISMISS PETITION FOR WRIT
OF HABEAS CORPUS.

A petition for a writ of habeas corpus was sub-
mitted by this petitioner in propria persona to the

above named court, on August 22, 1944, and filed on or about August 24, 1944.

The respondent James A. Johnston, Warden was ordered to appear before the above named court on September 2, 1944, to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein, as prayed for.

The respondent asked for and was granted, a continuance until September 16, 1944. On that date, instead of the return To Show Cause, which the court had ordered the respondent to produce, the Respondent and his legal representatives, substituted a motion styled, "Motion To Dismiss Petition For Writ Of Habeas Corpus," in total disregard of the express requirement of Section 456 and 457 Of Title 28 U.S.C.A.

It is therefore within customary procedural standards of habeas corpus proceedings, that this petitioner respectfully urges this Honorable Court to dismiss respondent's premature motion, and to [22] order said respondent to proceed with the return to show cause, in conformity with statutes made and provided for.

The petitioner respectfully urges this Honorable court for the dismissal of said Respondent's "motion to dismiss," for the further and pertinent reasons To Wit:

I.

We find on page one of Respondent's "motion to dismiss"— "—there is no merit therein, and that the same is insufficient to justify the issuance of a writ of habeas corpus."

Now Respondent makes the illogical claim "there is no merit therein". For comparative analysis we quote petitioner's contention in his petition for writ of habeas corpus No. 23604-G, page one, last paragraph—

"That petitioner is now restrained of his lawful liberty, by color of authority of a court judgment, without force or effect in law; in that his conviction was obtained without due process of law, expressly in violation of the fifth amendment to the United States Constitution. Inasmuch that he pleaded not guilty—yet had no jury trial constitutionally guaranteed by Article III, Section II, Clause III, of the original United States Constitution, and reiterated in the Sixth Amendment and emphasized in the Seventh Amendment to the United States Constitution."

The petitioner "pleaded not guilty, yet had no jury trial," which constitutes a lack of and denial of, due process of law; yet counsel for respondent makes the singular claim, that such a contention has "no merit." [23]

We find on page 449 of C.J.S. Vol. 39 Habeas Corpus—Section 15—

"The principles stated in this section must be construed and applied so as to preserve, not destroy, constitutional safeguards of human life and liberty—".

Johnson v. Zerbst, Ga. 58 S. Ct. 1019;

Bridwell v Aderhold, 13 F. Supp., 253, and the use of the writ of habeas corpus has been held to extend to cases where convictions has been in dis-

regard of accused's constitutional or fundamental right's.

Pyle v. State of Kansas, 63 S. Ct. 177, 317 U.S. 213;

Cochran v. State of Kansas, 62 S. Ct. 1068, 316 U.S. 255;

Smith v. O'Grady, 61 S. Ct. 572, 312 U.S. 329;

Bowen v. Johnston, 97 F. 2d 860, Cert., granted—59 S. Ct. 98;

Johnson v. Zerbst, Supra;

MacDonald v. Hudspeth, C.C.A. Kan., 125 F. 2nd 465;

Egan v. Knewel, 298 F. 784;

Which result in the absence or loss of jurisdiction of the court and the writ is the only effective means of preserving those right——.

Waley v. Johnston, Cal., 62 S.Ct. 964, 316 U. S. 101;

While the foregoing rule has been applied, notwithstanding defendant failed to appeal——

Johnson v. Zerbst—Supra, Cert., granted 58 S. Ct. 610;

Bridwell v. Zerbst, 97 F. 2nd 992;

Habeas Corpus is the proper remedy——

“Where a judgment of conviction and sentence are had without due process of law.” [24]

Voight v. Webb D. C. Wash., 47 F. Supp. 743; Vol. 39 C.J.S. Section 26 Note 22 page 488;

Statutory proceedings dispensing with trial by jury, in violation of the Constitutional guaranty, do not constitute due process of law, and relief may be had by Habeas Corpus—page 520 Section

29 of Vol., 39 C.J.S. See also Section 29 C.J.S. page 48 Note 88.

The fifth amendment to the United States Constitution undeniable states—"No person shall be—deprived of life, liberty, or property, without due process of law."

It is therefore conclusively shown that the writ of habeas corpus is the only effective remedial relief available to this petitioner. It is believed legally, substantively and properly applied in harmony with his "contention" or "grounds for the granting of the writ."

II.

The respondent on page two of his "motion to dismiss" says in part——

"This is the second petition filed herein by the petitioner for a writ of habeas corpus in which he raises a jurisdictional question identical to that previously raised in a prior petition in case No. 23016-R."

We now quote petitioner's contention or grounds for the writ, as stated in case No. 23016-R, to which respondent makes the false claim that the contention therein is identical, as it is in the petition in case No. 23604-G, or the one before this Honorable Court at this instance.

In case No. 23016-R, or the former or prior case, the contention was as follows: page 1, item III:

[25]

"No probable, just, proper, or legal cause, why this petitioner should be in a Federal penitentiary

is in force, only in that the District Court usurped jurisdiction where it rightfully reposed in the state and county thereof, no palpable, factual or visible Federal crime existed, for your petitioner to be tried for.”

Now we quote petitioner’s contention embodied in the petition before this Honorable Court, or in case No. 23604-G (quoted in full on page 1, *supra*) of this mem.

By no stretch of the most vivid imagination could one construe these two contentions as being identical, of even remotely similar in point, which Respondent so earnestly, but erroneously, construes them to be.

That the first is distinctively a jurisdictional question is conceded beyond doubt, which was totally and wilfully disregarded, by wily resourceful counsel for Respondent, A. J. Zirpoli, before the Honorable United States District Court Judge, Michael J. Roche.

In the latter “contention,” of the instant case, now pending, it is distinctly and undeniably a constitutional question—fully guaranteed to all Americans by Article III of the United State Constitution.

This expressly states: “——all criminal trials shall be by jury——.” And Amendment Six plainly support that right in the following language:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.”

We continue on page two of Respondent’s “mo-

tion" where [26] respondent still is supposedly quoting from the petition in case No. 23016-R.

"—Petitioner was forced to trial without a jury and without a proper waiver thereof."

This is pure deliberate fabrication, set in Respondent's "motion," to distract, misguide, and mislead this Honorable Court as to the real issue; for in reality there is no such allegation, or any words, whereby such a construction or inference, could be adduced from movant's petition submitted in case No. 23016-R. It is quite evident that Respondent has, perhaps unintentionally, misconstrued the contention in case No. 23016-R, and the contention in case No. 23604-G, we only assume this, because such allegation does appear in the petition now pending before this Court.

In truth and reality the two petitions, in the former and the present action, are totally, factually and absolutely, unrelated on any point of the contention embodied in either, and by no means is the issue *res judicata*. The contention in this latter petition has not been ruled upon by the United States District Court in the prior action.

In order to further establish this assertion, we refer to the memorandum of opinion, handed down in that case by the Honorable Michael J. Roche, page four.

Mr. Zirpoli, questioning the petitioner:

"Q. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

“A. By petitioner: I do not raise that point in my petition. [27]

“Q. Then you are not raising that point in your petition and you are not raising that point before the Court now?

“A. No.”

This plainly proves beyond doubt the issue of trial without a jury, was not a part of petitioner's prior contention. The fact of the matter is this assertion occurs in the petition in case No. 23016-R, under the heading “Statement of Fact,” which begins on page two of the petition in that case. This was a statement made by petitioner's attorney, and still is believed to be true, whether this was a true or erroneous statement by counsel, petitioner cannot say. It should not, for that reason loom as any issue, since it occurs under the “Statement of Fact.” It could hardly be construed as an allegation of the contention; since it was promptly denied as any part thereof, by the petitioner when the issue was raised by Mr. Zirpoli, page four of memorandum of opinion, in that case, No. 23016-R.

Respondent further claims, page two of his “Motion to Dismiss”:

“Petitioner was accorded ample opportunity in the first hearing on a writ actually issued to present and prove facts showing that he had not waived a jury at the time of his trial and conviction.”

This statement is barren of any truth, as proven by the memorandum of opinion in that case No. 23016-R, and above testimony.

If an issue is not raised how could one have

“ample opportunity to present and prove facts showing that he did not waive a jury——,” when one does not raise such an issue, as Respondent claims petitioner did in his first petition?

There is nothing whatsoever in movant’s first petition, or his [28] second petition, which is in conflict, nor does he “make a false and perjured pleading——,” as the respondent so imprudently charges.

Had the movant’s contention in his first petition, in case No. 23016-R, been justly and lawfully considered, instead of a deliberate evasion of the contention, and tangently misconstrued; then this petition, would in all probability not have been a necessity, for the petitioner would have had access to appeal, but one cannot appeal from a proceeding wherein the Court raised five points as the petitioner’s contention, when in reality there was but one, which can be simply stated:

“The trial court never had jurisdiction to proceed, since no Federal statute was violated.”

But the able and wily Assistant District Attorney, Mr. Zirpoli, did not scrutinize the petition with an intent upon justice, or open mindedness, but with an insidious impulse to search out some technical defect, to present before the Court, so petitioner would be denied the granting of the writ.

The respondent further claims in his “motion” —there is nothing presented in, or in support of his present petition to indicate that any useful purpose would be served by the issuance of the writ.”

Isn't such a statement in itself explanatory, that Respondent is not interested in according the relief, for which statutory provisions were enacted, for those deprived of their constitutional rights? A duty devolves upon the courts and its representatives, to redress any viloated constitutional right, thus called to their attention. [29]

The petitioner in submitting his petition in this case submitted therewith an exhibit "B" which constitutes the official records of the trial court. That exhibit plainly undeniably shows movant pleaded not guilty, yet had no jury trial.

That, and exhibit "C," positively further show he did not intelligently, competently and voluntarily waive that constitutional right. To constitute an intelligent waiver it must be in writing with the mutual consent of the Court. That has been held and applied as a basis for cases coming within such a category, by the United States Supreme Court so held in *Adams v. United States*, 62 St. Ct. 238;

Patton v. United States, 281, U.S. 276, 50 S. Ct. 253; *Schick v. United States* 195 U.S. 65, 24 S. Ct. 826; *Callan v. Wilson*, 127 U.S. 540, 8 S. Ct. 1301; *Thompson v. State of Utah*, 170 U.S. 343, 18 S. Ct. 620;

These authorities emphatically hold one cannot waive the constitutional right to trial by jury, unless he does so intelligently, competently, and voluntarily. Such a waiver was not made by this petitioner, and as stated under point one supra—resort to habeas corpus is the only effective and proper remedy.

III.

The respondent invokes as new and as yet the unsanctioned procedure in substituting a Motion to Dismiss before the Return to Show Cause is returned. This evidently is contrary to customary procedure, and no doubt is resorted to in order that petition be compelled to exhaust his authorities, in gaining the dismissal of such an unorthodox motion. [30]

In general a return must be made to the writ in accordance with the command of the writ and required by statute.

Ex parte Gutierrez, 36 p. 2d, 712, 1 Col. App. 2d, 281; Bagley v. Young, 134 p. 2d, 1098;

In habeas corpus proceedings, it is incumbent on the person depriving another of his liberty to show a right to do so.

On a motion to quash the writ, allegations of the petitioner are deemed admitted; Jensen v. Sevy, 134 p. 2d 1081; Vol. 29 C.J.S. page 154 Note 58.

In some jurisdiction it is held that the Court has no jurisdiction to proceed with the determination of an application for relief under a writ of habeas corpus in the absence of a return. Jensen v. Sevy, 134 p. 2d, 1081.

CONCLUSION

The petitioner would not be before this Honorable Court had he been accorded those constitutional rights, by the trial court of which he now complains. He was denied those rights of just procedural form and constitutional safeguards, and now seeks the

only relief available to him, to redress those violated rights.

Should the respondent or trial court feel justice is not being done, by the granting of a writ of habeas corpus in this case, it should be remembered, that the trial court, still would have jurisdiction to accord him a trial in conformity with the United States Constitution.

Wherefore, it is respectfully called to the attention of this Honorable Court that good and sufficient cause having been shown; [31] Respondent's "motion to dismiss the petition for writ of habeas corpus," should be dismissed, and Respondent ordered to make the return to show cause as law and justice requires.

Respectfully submitted,

RALPH SWIHART

Petitioner and Movant, Pro.
Se.

Dated this 27 day of September, 1944, at Alcatraz, California.

[Endorsed]: Filed Sep. 29, 1944. [32]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AND DISMISSING
PETITION

The verified petition for writ of habeas corpus filed herein on August 23, 1944 in substance alleges

that petitioner is unlawfully deprived of his liberty by respondent because his conviction in the United States District Court of the Eastern District of Oklahoma for violation of 18 U.S.C.A. 409 was contra to the Fifth Amendment of the Constitution in that despite his demand for jury trial, he was denied the same and was tried and convicted by the Judge of the Court. [33]

Ordinarily such an allegation would present a factual issue requiring the issuance of the writ and a hearing thereon.

The court issued an order directed to respondent requiring him to show cause why the writ should not issue. Respondent, in response, moved to dismiss the petition, alleging that on December 16, 1943, petitioner filed a verified petition for writ of habeas corpus herein (23016-R) wherein he asserted among many other matters, that he waived a jury trial in the Oklahoma case, in reliance upon an alleged promise, that if he were found guilty by the court, probation would be granted him. Upon hearing before Judge Roche in case #23016, petitioner abandoned the foregoing contention and introduced no evidence in support thereof. Judge Roche made written findings to such effect and dismissed the petition.

Thus petitioner under oath, has alleged in one petition that he waived a jury and in another petition that he was refused a jury despite his demand therefor. The writ of habeas corpus cannot be availed of to serve the purposes of a petitioner who has so little regard for the truth.

While the doctrine of *res adjudicata* does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant. *Salinger v. Loisel*, 265 U.S. 224. *Mothershead v. King*, 37 Fed. Suppl. 210. [34] Furthermore the issue raised herein could have been disposed of in case #23016-R, but was abandoned, *U. S. ex rel Bergdoll v. Drum* (Cir. 2) 107 Fed (2d) 897.

The petition for writ of habeas corpus is denied and the petition is dismissed.

Dated: October 3, 1944.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Oct. 3, 1944. [35]

[Title of District Court and Cause.]

To the Honorable United States District Judge—
Louis E. Goodman.

MOTION FOR REARGUMENT UPON THE
PETITION FOR WRIT OF HABEAS
CORPUS IN CASE No. 23604-G

Movant herein respectfully petitions for a granting of reargument upon the petition for a writ of habeas corpus, as prayed for in petitioner's original petition for writ of Habeas Corpus, in case No. 23604-G; which said application was denied, by this Honorable court by an order duly entered in

the office of the clerk of the above named court, on the 3rd day of October, 1944. Upon the ground, and for the reasons, that this court in denying the application for the issuance of the writ of habeas corpus misapprehended and misconstrued the petitioner's contention, and the authorities cited; and entirely circuvented the issue raised in the petition on behalf of the petitioner; and the claims made on his behalf in the interest of substantial justice.

ARGUMENT

I.

Petitioner on December 16, 1944, filed a petition for writ of habeas corpus—case number 23016-R in which the contention was— [36]

“no probable, just, proper, or legal cause, why this petitioner should be in a Federal penitentiary is in force, only in that the District Court usurped jurisdiction, wherein it rightfully reposed in the state and county thereof, no palpable, factual or visible Federal crime existed for your petitioner to be tried for.”

Instead of the court sticking to the facts, they evidently searched the wording of the petition to find some words which they could convert into a contention of their own choosing.

On January 3, 1944, Respondent was ordered to show cause, and on February 16, 1944, the return to show cause was filed, and counsel for respondent therein first raised the contention, “that petitioner waived jury trial with the promise of probation,”

Point III page 2.

In the traverse to that return—page 2, point III-B—, We quote in full:

“Learned counsel for respondent magnifies as paramount point III of the return to order to show cause, which in reality is nothing more nor less a statement of fact showing the inducement which was employed, to obtain a jury waiver. It is not a separate point urged by your petitioner, but a mere part of the whole—and the whole is—that the United States District Court for the Eastern District of Oklahoma never had any vested lawful jurisdiction to try your petitioner.”

When the petitioner was brought before the court for the hearing of the writ, counsel for respondent again evaded petitioner’s contention, and again brought up the issue—on page five and six of the testimony taken down in that hearing—we quote verbatim—on page six—

Q. “Do you now contend that you waived your jury because of the fact that probation had been granted to you in the event you did that?”

A. “I do not raise that point in my petition.”

Q. “Then you are not raising that point in your petition [37] and you are not raising that point before the court now.”

A. “No.”

See also page 6 and 7 of Exhibit A, attached hereto and made a part hereof (memorandum of opinion in case No. 23016-R).

Judge Roche, in denying the granting of the writ, plainly sets out in the above exhibit A—page 6 and 7, that this was no contention of petitioner, but did believe in the first instance it was, but only because counsel for respondent deliberately raised that issue to mislead the court from petitioner's true contention. He denied the granting of the writ because of that fact—see point 5 of page 6, Exhibit A.

The petitioner in applying for the writ was sincere in his endeavor to set down all the facts, and circumstances to enable the court to obtain a comprehensive view, and understanding of the complete case.

The petitioner's reward for this diligence was a deliberate raising, by counsel for respondent, of at least five points of contention, wherein there was but only one. The result of that proceeding, for the application for a writ of Habeas Corpus, developed into a bedlam of scrambled contentions and confusion, which one could not, within reasonable limitations, appeal to an appellate court.

The process to obtain a writ of Habeas Corpus is not to confuse, or mislead, but get at the issue. The very case the court quotes against petitioner in the order denying petition for writ of habeas corpus—(No. 23604-G) namely—

Salinger v. Loisel, 44 S. Ct. 521 at page 521—*desig.* 230 [38] it says:

“As it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that

was taken should not have been selected, nor should the court have permitted it.”

Counsel for respondent also used this case against petitioner in his premature “motion to dismiss,” but it is strange he overloaded the above question, for in reality he succeeded to invoke the same condition of confusion in petitioner’s second application for a writ of Habeas Corpus.

The petitioner upon the stand in his hearing for the granting of the writ, in the first instance—case No. 23016R—stated his contention simply and earnestly in the words—

“That the court had no jurisdiction, the United States District Court for the Eastern District of Oklahoma did not have jurisdiction.”—see page 5 of transcript of testimony in that hearing—at 16-17.

Yet the court disregarded this contention and circumvented the issue by raising a statement of fact to a contention, which was deliberately and unscrupulously resorted to, in order that petitioner would be denied, and not with an eye towards justice for which it is presumed the courts of the United States were created—;

“Questions which merely lurk in the record neither brought to the courts attention, nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” Perkins v. Endicott Johnson Corp. 128 F. 2d 208; Webster v. Fall 266 U.S. 507; 511, 45 S. Ct. 148, 149, 69 L. Ed. 411; Quong Wing v.

Kindendall, 223, U.S. 59, 64, 32 S. Ct. 192, 56 L. Ed 350.

II.

On August 22, 1944, petitioner applied for another writ of habeas corpus, this application was filed on or about August 24, 1944 and assigned to the Honorable Louis E. Goodman. [39]

An order to show cause was made returnable on the 2nd day of September 1944. On September 16, 1944 learned counsel for respondent, instead of the return to show cause, substituted and submitted a "motion to dismiss," which was not proper, nor in conformity with the Statutes governing the writ of habeas corpus. In this premature motion, Respondent raised the identical contention raised before Judge Roche, Case No. 23016-R, and totally disregarded the contention in the new action—23604-G. This is another obvious trait and trick to bemuse, ridicule, and confuse an innocent victim's recourse to the writ of habeas corpus. First counsel for respondent claimed the writ had no merit—page 2 of his "motion to dismiss," and then he changes this to say the writs from Alcatraz are becoming "a Mockery."

And why—only because the learned District Attorney cannot face the facts, or go by the express mandates of the Statutes which he is under oath to do, he seems to have a preconceived hate and prejudice for all Alcatraz inmates, forgetting the fact, that the Federal trial courts have made dozens of glaring mistakes, in illegal convictions and excessive sentences.

III.

The Honorable Judge Louis E. Goodman in his "order denying petition for Writ of Habeas Corpus and Dismissing Petition, seems to have considered only Respondent's "Motion to Dismiss the Petition for the Writ of Habeas Corpus."

The Petitioner filed a Memorandum in opposition asking therein to dismiss respondent's motion and stating apt procedural reasons thereof. This motion, for reasons only known to the court and [40] counsel for respondent, was not considered by the court. Had such been the case it would have been alluded to in the Order Denying Petition for Writ of Habeas Corpus, but nowhere therein is mention made of that fact. Such an opinion, by a court of competent jurisdiction, usually makes note of the actions to date, so one can assume, by such absence that the respondent's "motion" was heard and not the petitioners.

This is possibly so, because in the memorandum of petitioner and movant, page four—whole page, he again, and in no uncertain language, emphatically points out to the court the wilful and sinister subterfuge and by-pass, to circumvent the main issue raised in this latter petition, and petitioner reiterates again for the record, it was not a part of the first petition, only wherein the respondent and court tried to make it a part of that proceeding, by counsel for respondent, who again as in the first petition, attempts a similar movement of confusion and evasion, to mislead and confuse the records as to the main issue before the court.

For the sake of the records this petitioner wishes

to state that he had no—"trial by jury—yet pleaded not guilty." This was no contention in Writ—No. 23016-R, but was the only and singular contention in the petition for the writ of Habeas corpus in the instant case No. 23604-G.

Exhibit B and C attached to petitioner's petition for writ in case 23604-G bears out this contention.

A simple contention which raises an issue, but the court choose to complicate, confuse and belittle an innocent victim in search of justice. [41]

It is possible that the general administration of justice is contrary to the Statutes and the Constitution.

CONCLUSION

It is believed by this petitioner that a reargument should be permitted upon the hearing for the issuance of the writ of habeas corpus, as prayed for in the original petition to this honorable court.

Petitioner feels aggrieved, and rightfully so, that his memorandum in opposition to respondent's "Motion to dismiss," was not accorded a hearing before this court. Had it been so considered, the custom would have been for the issuance of the writ.

Wherefore good cause having herein been shown and factual reasons submitted, it is respectfully submitted that this motion for reargument should be granted in the furtherance of justice and proper American procedural form.

Respectfully Submitted,

RALPH SWIHART

Petitioner & Movant Pro. Se.

VERIFICATION

Personally appeared before me Ralph Swihart, who after being duly sworn, upon his oath, deposes and says:

That he has read the contents thereof, and herein, and that they are true to the best of his knowledge and belief.

That this motion is not filed for any purpose of delay or other reason of impediment.

RALPH SWIHART

Affiant and Movant.

Subscribed and Sworn to before me a Notary Public, this 16 day of October A. D. 1944. [42]

Records at U. S. Penitentiary, Alcatraz, California, Indicate that Ralph Swihart Is a Citizen of the United States.

[Seal]

E. J. MILLER

Associate Warden,

United States Penitentiary,

Alcatraz, California

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths. [43]

EXHIBIT 'A'

In the Southern Division of the United States
District Court for the Northern District of
California

No. 23016-R

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Respondent.

Proceeding by Ralph Swihart against James A. Johnston, respondent, to secure release by habeas corpus from said respondent's custody.

Writ of habeas corpus discharged and petition for writ of habeas corpus dismissed.

Petitioner appearing in propria persona.

Frank J. Hennessy, Esquire, United States Attorney, and A. J. Zirpoli, Assistant United States Attorney, both of San Francisco, California, attorneys for respondent.

MEMORANDUM OF OPINION

Michael J. Roche, District Judge:

Ralph Swihart, a prisoner in the United States Penitentiary at Alcatraz Island, California, filed a petition for writ of habeas corpus by which he seeks his release from the custody of the respondent, James A. Johnston, Warden of the said penitentiary.

The petition is quite lengthy and extremely difficult to understand. Although petitioner evidently has access to a law library, [44] his failure to understand the matters cited by him, indicates that he is unlearned in the law and without understanding of the questions which may be properly presented by a petition for writ of habeas corpus. However, giving the petition the most favorable interpretation possible, it appears that petitioner's contentions are briefly as follows:

1. That the indictment, No. 22273, which purports to support his judgment of conviction, does not allege offenses against the United States;

2. That the trial Court (United States District Court for the Eastern District of Oklahoma) did not have jurisdiction of the person of petitioner or the subject matter of the indictment;

3. That the petitioner is not guilty of, and was not tried for, the offenses alleged in the said indictment;

4. That his conviction was secured by the use of evidence illegally obtained and by the failure to produce evidence essential to the proof of the case against him;

5. That he waived a jury trial and consented to be tried before the trial Judge only because of a promise that by doing so he would be given probation if convicted.

On this petition an order to show cause issued and the petitioner was granted a hearing thereon in which he appeared as the only witness.

This court, after considering the petition, the exhibits attached thereto, and the evidence, finds:

1. That the indictment charges offenses against the United [45] States in violation of Section 409 of Title 18, U.S.C.A., to-wit:

(1) The unlawful breaking of the seal of a freight car containing interstate shipments of freight, and (2) the entry of such car with intent to commit larceny therein;

2. That the trial court had jurisdiction over the person of petitioner and the offenses charged in the indictment;

3. That the petitioner was duly tried and convicted for the offenses alleged in the indictment, and his guilt or innocence of the crimes charged therein can not now be collaterally attacked by a petition for writ of habeas corpus.

Kelly vs. Johnston, (CCA-9), 128 F. (2d) 793, certiorari denied 317 U.S. 699; reh. den. 318 U.S. 798;

Osborne vs. Johnston, (CCA-9) 120 F. (2d) 947;

4. That even if true (without deciding it to be a fact) that petitioner's conviction was secured through the use of evidence illegally obtained and by the failure to produce other evidence essential (according to petitioner) to the proof of a case against him, such error is not correctable on habeas corpus.

Burrall vs. Johnston, (CCA-9) 134 F. (2d) 614, certiorari denied 319 U.S. 768;

Price vs. Johnston, (CCA-9), 125 F. (2d) 806, certiorari denied 316 U.S. 677, reh. den. 316 U.S. 712.

5. That the petitioner no longer contends that he waived a jury trial because of a promise that he would be given probation if convicted, and furthermore no evidence appeared in the record to support this contention. Had it not been for this last contention, the Court would not have granted the writ of habeas corpus and would have denied the petition because of insufficiency on its face. [46] The language of the petition which caused the issuance of the writ, reads as follows:

“On March 13, 1940, your petitioner went into the United States District Court, for the Eastern District of Oklahoma, Judge Alfred P. Murrah presiding and was thereupon met by counsel W. P. Gullatt who advised me as following:

‘I had a talk with the Judge and District Attorney, they both agree if you will waive a jury trial and take your chances before the judge, he has agreed to give you probation if you are convicted. I advise you to do that.’

Your petitioner, against his better judgment agreed to this, and accordingly was called to the bench and waived jury trial.”

However, at the hearing on the writ of habeas corpus he did not press this charge, as the following excerpt from the testimony before this Court clearly shows:

“Q. I want to ask you one further question Mr. Swihart. I notice in your petition that you make a contention——

The Court: What page?

Mr. Zirpoli: Page 4 of the petition. You state that on March 13, 1940, your petitioner went into the United States District Court for the Eastern District of Oklahoma, Judge Alfred P. Murrah presiding, and was thereupon met by counsel W. P. Gullat, who advised as follows: “I had a talk with the Judge and District Attorney: They both agree if you will waive a jury trial and take your chances before the Judge, he has agreed to give you probation if you are convicted. I advise you to do that.” Your petitioner, against his better judgment, agreed to this, and accordingly was called to the bench and waived jury trial. The testimony then presented follows’. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

A. I do not raise that point in my petition.

Q. Then you are not raising that point in your petition, and you are not raising that point before the court now?

A. No.”

Since petitioner no longer contends that he waived his right to a jury trial because of a promise of probation for so doing and [47] has offered no proof in support of this contention, and since the convicting Court had jurisdiction over the offense

charged and the person of petitioner, it can not be said that that Court lacked jurisdiction in the premises or lost the same in the course of the proceedings.

Wherefore, in accordance with the foregoing, It Is Ordered, Adjudged and Decreed, that the writ of habeas corpus issued herein. be, and the same is, hereby denied; that the petition for writ of habeas corpus filed herein be, and the same is, hereby dismissed, and that petitioner be, and he is, hereby remanded to the custody of respondent.

This memorandum opinion may be deemed for all purposes wherein necessary as the Findings of Fact and Conclusions of Law of this Court.

Dated: May 2, 1944.

MICHAEL J. ROCHE

United States District Judge

A true copy.

E. J. MILLER

Associate Warden.

[Endorsed]: Filed Oct. 18, 1944. [48]

[Title of District Court and Cause.]

ORDER

Ordered petitioner's motion for reargument and rehearing herein is denied.

Dated: October 25, 1944.

LOUIS E. GOODMAN

United States District Judge

[Endorsed]: Filed Oct. 25, 1944. [49]

United States District Court, Northern District of
California, Southern Division

H. C. No. 23604—G

UNITED STATES OF AMERICA ON THE
RELATION OF RALPH SWIHART,

Relator-Appellant

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California.

Respondent-Appellee

NOTICE OF APPEAL

Sirs:

Please Take Notice, that the above named Relator Hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order of the United States District Court for the Northern District of California, entered in the office of the Clerk of said court on the 3rd day of October, 1944, dismissing the petition for writ of Habeas Corpus, and from each and every part of said order as well as from the whole thereof.

Dated this 4 day of December, 1944.

Respectfully submitted,

RALPH SWIHART

Relator-Appellant, Pro. Se.

P.M.B. Box 590 AZ.,

Alcatraz, California.

[Endorsed]: Filed Dec. 7, 1944. [52]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 57 pages, numbered from 1 to 57, inclusive, contain a full, true and correct transcript of the records and proceedings, as enumerated in the Praecipe for Transcript of Record, in the matter of Ralph Swihart, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Case No. 23604 G on Habeas Corpus, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$15.50, and that the said amount has been paid to me by the Appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of January, A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. Van BUREN

Deputy Clerk. [58]

[Endorsed]: No. 10969. United States Circuit Court of Appeals for the Ninth Circuit. Ralph Swihart, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: January 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10969

RALPH SWIHART,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California.

Appellee.

Appeal from the District Court of the United
States for the Northern District of
California

STATEMENT OF POINTS

These Are Habeas Corpus Proceedings.

Petitioner, on March 13th 1940, was sentenced

to twenty years in the custody of the attorney general on two counts of indictment No. 22273. Said indictment alleged a violation of Section 409 of Title 18 U.S.C.A.

On a plea of Not Guilty, Petitioner, Without the Constitutional Right of Trial by Jury, was pronounced guilty by the District Judge presiding, Alfred P. Murrah, the then Federal District Judge for the Eastern District of Oklahoma.

I.—In petitioner's application for a writ of habeas corpus, which was filed August 23, 1944, in the United States District Court for the Northern District of California, an order to show cause was issued to respondent, who failed to comply therewith, and instead, the court permitted counsel for Respondent to enter a "motion to dismiss," which was contrary to the statute governing Habeas Corpus proceedings.

II.—The said above named court did not consider the issue raised in petitioner's application, but circumvented an adjudication thereupon by reference to a prior application, which had no distinct relation to the issue raised.

III.—The issue, whether a person can be arbitrarily adjudged guilty by one man, when he pleaded not guilty and was denied the right to trial by jury; when the records show he did not

competently, intelligently, or voluntarily waive that constitutional right.

Respectfully submitted,

RALPH SWIHART

Pro. Se.

Appellant,

Alcatraz, Calif.

Dated: day of, 1944.

[Endorsed]: Filed, Jan. 20, 1945. Paul P.
O'Brien, Clerk.

